Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

WILLIAM B. BELL, *et al.*,

Petitioners,

v.

ROBERT HAUK, Individually and as Public Printer of the United States, and his agents, assigns and successors in office and COLUMBIA TYPOGRAPHICAL UNION, No. 101-12,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

FREDERIC W. SCHWARTZ, JR.
Suite 600
1627 K Street, N.W.
Washington, D.C. 20006
(202) 463-0880
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19 pp

QUESTIONS PRESENTED

1. Does the formulation of a *prima facie* case of discrimination set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), apply to black GPO printers who seek to change their shift when the only bar to doing so is a seniority list in which the first 53 positions are occupied by white printers?

2. Can a Circuit Court utilize the devices of summary affirmance and an unpublished opinion to escape review by this Court?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. THE DISTRICT OF COLUMBIA CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDINGS IN *MCDONNELL DOUGLAS CORP. V. GREEN*, 411 U.S. 792 (1973), *PULLMAN-STANDARD V. SWINT*, 456 U.S. 273 (1982) AND *LORANCE V. AT&T TECHNOLOGIES, INC.*, 490 U.S. 900 (1989) 4

II. THIS COURT SHOULD SUMMARILY VACATE THE JUDGMENT AND REMAND TO THE CIRCUIT COURT 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES CITED:

Griggs v. Duke Power Co. 401 U.S. 424 (1971) 5, 6

Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) 4, 5, 6

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 4, 5, 7

Pullman-Standard v. Swint, 456 U.S. 273 (1982) ... 4, 5, 6, 7

Teamsters v. United States, 431 U.S. 324 (1977).....5, 7

United States Department of State, et al. v. Legal Assistance for Vietnamese Asylum Seekers, No. 95-1521 (October 21, 1996) 8

STATUTES CITED:

28 U.S.C. § 1254(1) 2

42 U.S.C. §§ 2000e (Title VII) 2, 3, 5, 6

42 U.S.C. § 2000e-2(a) 2, 6

42 U.S.C. § 2000e-2(h) (§ 703(h), Title VII)..... 3, 5, 6

42 U.S.C. § 2000e-5 1

42 U.S.C. § 2000e-16(d) 3, 5

PETITION FOR A WRIT OF CERTIORARI

The petitioners, William B. Bell, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in the above proceeding on August 16, 1996, as modified following rehearing on December 12, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit and its modification following rehearing are reprinted in the appendix at pages 1a and 3a *infra*.

The Order of the United States District Court for the District of Columbia and its pertinent findings of fact and conclusions of law are reprinted in the appendix at 5a *infra*.

JURISDICTION

This action was filed by seventeen black printers employed at the Government Printing Office on August 16, 1991, in the District Court for the District of Columbia under 42 U.S.C. § 2000e-5. On April 28, 1995, following a bench trial which had concluded nineteen months earlier, the trial Court ruled in favor of the Government Printing Office and the intervenor Columbia Typographical Union by adopting, essentially *verbatim*, the findings of fact and conclusions of law which they had proposed.

On petitioners' appeal, the District of Columbia Circuit summarily affirmed the District Court, modifying its decision following rehearing. The petitioners' petition for rehearing *en banc* was denied.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII") is set forth below:

> § 2000e-2. Unlawful employment practices
>
> It shall be an unlawful employment practice for an employer –
>
> * * *
>
> (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Seventeen black journeyman printers sued their employer, the Government Printing Office (GPO). They alleged that a "priority list" (based on seniority) of journeyman printers which the GPO used exclusively to make shift and other job-related assignments, and whose first

53 out of 102 positions were held by whites, was discriminatory. Since these black journeyman printers could not change their shift and obtain other assignments, they were required to perform a substantially greater number of hours of more difficult work called being "on the hook" than were white journeyman printers.

The GPO did not challenge either the fact that whites occupied the top 53 positions on the "priority list" or that the black printers worked more hours "on the hook". Further, the GPO did not cross-appeal the determination of the motions Court that 42 U.S.C. § 2000e-16(d), the provision enacted in 1972 to extend Title VII protection against discrimination to Federal employees, did not incorporate Title VII's exception for seniority systems. *See* § 703(h). Rather, GPO essentially argued that the percentage (as contrasted with the number) of hours which black printers and white printers worked on the hook were equal when one excluded the white printers who were not required to work on the hook, *i.e.*, those at the top of the "priority list" who could move to shifts and assignments where hook work was not required.

The black journeyman printers appealed the decision of the trial Court in favor of the GPO. The Circuit Court, in a modified Order following rehearing, granted GPO's motion for summary affirmance, concluding:

> [a]ppellants failed to establish a *prima facie* case for either a disparate treatment or a disparate impact claim under Title VII. Appellants did not demonstrate that: (1) they had applied and were qualified for the positions they were seeking; (2) despite their qualifications, they were rejected for the positions; and (3) similarly situated

white applicants of equal or lesser qualifications than they had been selected for the position. Appellants also did not demonstrate that the challenged practice had a disparate impact on them.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT OF COLUMBIA CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDINGS IN *MCDONNELL DOUGLAS CORP. V. GREEN*, 411 U.S. 792 (1973), *PULLMAN-STANDARD V. SWINT*, 456 U.S. 273 (1982) AND *LORANCE V. AT&T TECHNOLOGIES, INC.*, 490 U.S. 900 (1989).

The judgment of the Circuit Court flatly (and inexplicably) rejects the controlling authority of this Court as set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) and *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989). The requirements for a *prima facie* case cited by the Circuit Court in granting summary affirmance, *i.e.* demonstrating that (1) the plaintiffs had applied and were qualified for the positions they were seeking; (2) despite their qualifications, they were rejected for the positions; and (3) similarly situated white applicants of equal or lesser qualifications than they had been selected for the position, is not appropriate when (1) the employment decision relates to shift and division assignments; (2) the only qualification for making these assignments is the applicant's relative position on the "priority list" and (3) the black printers argue disparate impact as a result of

the "priority list." Indeed, *McDonnell Douglas Corp. v. Green, supra,* 411 U.S. at 802, from which the Circuit Court's articulation of a *prima facie* case was extracted without attribution, explained that these "specifications . . . of the *prima facie* proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n. 13. Rather, this Court has set out the requirements for a *prima facie* case under the GPO circumstances in *Pullman-Standard v. Swint,* 456 U.S. 273 (1982) and *Lorance v. AT&T Technologies, Inc.,* 490 U.S. 900 (1989).

In *Pullman-Standard,* this Court considered a seniority system maintained by a manufacturer of railroad cars. The Court first pointed out that Title VII is a broad remedial measure designed to bar practices which are "fair in form but discriminatory in operation". *Pullman-Standard* at 276, quoting *Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971). Consequently, " 'the Court has repeatedly held that a prima facie Title VII violation may be established by policies and practices that are neutral on their face and in intent but that nevertheless discriminate in effect against a particular group.' " *Pullman-Standard* at 276, quoting *Teamsters v. United States,* 431 U.S. 324, 349 (1977).

Thus, seniority systems would seem to be the perfect candidate for a disparate impact analysis. However, as this Court also pointed out, Title VII established an exception to these "general principles" in § 703(h) for seniority systems. *Pullman-Standard* at 276; 42 U.S.C. § 2000e-2(h). This would resolve the issue but for the fact that the GPO seniority system, as discussed *supra,* is not a § 703(h) seniority system since 42 U.S.C. § 2000e-16(d),

the provision enacted in 1972 to extend the federal protection against discrimination to Federal employees, did not incorporate the § 703(h) exception for seniority systems. Without the § 703(h) exception, *Pullman-Standard* stands for the proposition that a disparate impact attack can be launched against GPO's seniority system if the black printers could demonstrate "the maintenance of a discriminatory system".

Lorance v. AT&T Technologies, Inc., supra, dealt with a similar issue in relation to a seniority system which was facially neutral, as here, but whose result was "to limit, segregate, or classify . . . employees . . . in . . . any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, sex, or national origin." 42 U.S.C. § 2000e-2(a). This Court acknowledged that the plaintiffs' allegation of a disparate impact as a result of the seniority system "would ordinarily suffice to state a claim under § 703(a)(2), since that provision reaches 'practices that are fair in form, but discriminatory in operation.' *Griggs v. Duke Power Co.* 401 U.S. 424, 431 (1971). . . . " *Id.* at 904.

Justice Scalia noted, however, that seniority systems which were facially neutral, even though discriminatory, were afforded "special treatment under Title VII" which provided that they could not form the basis of a Title VII action. *Id.* at 904-905. In the matter *sub justice,* applying Justice Scalia's reasoning results in the converse conclusion. Since § 703(h) does not protect GPO's seniority system from disparate impact claims, *Lorance* stands for the proposition that a disparate impact attack can be launched against GPO's seniority system if the black

printers can demonstrate the maintenance of a discriminatory system.

Thus, the standard as set out in *Pullman-Standard* at 276, quoting *Teamsters v. United States*, 431 U.S. 324, 349 (1977), is applicable here. A " '*prima facie* Title VII violation may be established by policies and practices that are neutral on their face and in intent but that nevertheless discriminate in effect against a particular group.' " The GPO "priority list" is such a practice.

II.

THIS COURT SHOULD SUMMARILY VACATE THE JUDGMENT AND REMAND TO THE CIRCUIT COURT

The underlying question concerning a remedy, of course, is why this Court should bother with an unpublished decision summarily affirming a decision of a trial Court, no matter how much that decision diverges from this Court's precepts and its conclusion that "Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices which have fostered racially stratified job environments to the disadvantage of minority citizens". *McDonnell Douglas Corporation v. Green, supra* at 411 U.S. 800.

The black GPO printers would respectfully suggest that, much like Sir Roderick Murgatroyd in Gilbert and Sullivan's *Ruddigore*, it is this Court's duty to remind the Circuit Court that it is evading the conditions under which it is permitted to exist, *i.e.*, a rigid adherence to this

Court's carefully-honed advice. The Circuit Court's decision – even unpublished – is seriously damaging on two levels. First, it establishes an erroneous principle in the Circuit which has jurisdiction over a great majority of discrimination claims against the Federal government. Even though the Circuit Court's decision was summarily resolved and remains unpublished, this Circuit has concluded – and will require in the future – that Federal employee plaintiffs in seniority system cases must present a *prima facie* case which is contrary to this Court's intent. If anything, the failure to publish the Circuit Court decision makes it more likely that plaintiffs will be caught unawares.

Second, the failure to consider this petition because the Circuit Court's decision was summary and unpublished would substantiate the unwelcome conclusion among counsel for the Federal government that Supreme Court review can be avoided by the Circuit Court summarily resolving an appeal and then deeming it unworthy of publication despite its import. In this regard, petitioners note that the Circuit Court failed to cite any authority in support of its conclusions and articulation of the required *prima facie* case which further minimized its exposure to a possible petition for *certiorari*.

Petitioners would respectfully suggest that the Rules and past practices of this Court permit two methods to resolve this petition without devoting unnecessary resources to the task. This Court could vacate the judgment below and remand to the Circuit Court, as the Court did in *United States Department of State, et al. v. Legal Assistance for Vietnamese Asylum Seekers*, No. 95-1521

(October 21, 1996), calling the Circuit Court's attention to the authority cited *supra*. In the alternative, this Court could summarily reverse and remand under Rule 16.1, the previously cited opinions of this Court clearly having been misread. While Petitioner's counsel would be honored to enter into a colloquy with the Court, through briefing or otherwise, this Court has previously declined to afford him that privilege and, frankly, the clear misreading of this Court's previous decisions is apparent from the record. Further, while the Circuit Court is incorrect in its current determination, it has not considered the merits of the appeal and the petitioners do not suggest that the remedy provided by this Court should do more than permit their appeal to proceed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, the judgment vacated and the matter remanded to the Circuit Court.

Respectfully submitted,

FREDERIC W. SCHWARTZ, JR.
Suite 600
1627 K Street, N.W.
Washington, D.C. 20006
(202) 463-0880
Counsel of Record

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5201 **September Term, 1996**

William B. Bell, et al.,
Appellants

v.

Robert Houk, Individually and as Public Printer of the United States, and his agents, assigns and successors in office and Columbia Typographical Union, No. 101-12,
Appellees

BEFORE: Wald, Ginsburg and Sentelle, Circuit Judges

ORDER

(Filed Dec. 12, 1996)

Upon consideration of appellants' petition for rehearing, it is

ORDERED that the petition be denied. It is

FURTHER ORDERED, on the court's own motion, that the order filed herein on August 16, 1996, be amended, as follows:

Paragraph 2, beginning at line 5
delete all text in the paragraph after "(1980)."

and substitute therefor

> Appellants failed to establish a prima facie case for either a disparate treatment or a disparate impact claim under Title VII. Appellants did not demonstrate that: (1) they had applied and were qualified for the

positions they were seeking; (2) despite their qualifications, they were rejected for the positions; and (3) similarly situated white applicants of equal or lesser qualifications than they had been selected for the positions. Appellants also did not demonstrate that the challenged practice had a disparate impact on them.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5201 **September Term, 1995**
91cv02074

William B. Bell, et al.,
Appellants

v.

Robert Houk, Individually and as Public Printer of the United States, and his agents, assigns and successors in office and Columbia Typographical Union, No. 101-12,
Appellees

BEFORE: Wald, Ginsburg and Sentelle, Circuit Judges

ORDER

(Filed Aug. 16, 1996)

Upon consideration of the motion for summary affirmance, the responses thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980). Appellants failed to establish a prima facie case for a disparate treatment claim under title VII. Appellants did not demonstrate that: (1) they had applied and were qualified for the positions they were seeking; (2) despite their qualifications, they were rejected for the positions; and (3) similarly situated white applicants of equal or lesser

qualifications than they had been selected for the positions. In addition, appellants failed to challenge appellees' evidence regarding the legitimate business objectives of the priority system.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

Per Curiam
/s/ PW
/s/ DG
/s/ DBS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RONALD E. BAILEY, *et al.*, Plaintiffs, v. MICHAEL DIMARIO, Public Printer of the United States, Defendants.	Civil Action No. 91-2074 (HHG)

ORDER

(Filed Apr. 28, 1995)

Upon consideration of the evidence heard at trial on this matter, and the entire record herein, it is this 28th day of April, 1995, in accordance with the Opinion issued herewith

ORDERED that judgment be and it is hereby entered in favor of the defendant; and it is further

ORDERED that all remaining motions be and they are hereby denied as moot.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

OPINION

FINDINGS OF FACT

* * *

The collective bargaining agreement between GPO and CTU provides for a selection system for journeymen employees seeking transfers between shifts or to fill lateral vacancies within shifts which is based upon "priority." This system is contained in Article VII of the Memorandum of Understanding ("MOU") which provides, *inter alia*, that volunteers for transfers will be selected according to their continuous priority as journeymen in the GPO, provided they can meet the requirements for the position. The date than [sic] an employee became a journeyman at GPO is known as the journeyman "priority" date. The priority date reflects the date an individual commenced their job in EPD and does not reflect the number of years they may have been a journeyman printer working in another location or division at GPO, or for another employer. Article VII of the MOU (journeymen priority) applies to all initial appointments, reinstatements, assignments, reassignments or vacancies.

* * *